86-80

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH BURGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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July 18, 1986

QUESTION PRESENTED

Whether the fourth amendment of the United States Constitution disables the State from conducting an otherwise valid warrantless administrative inspection of commercial premises in a pervasively regulated industry, pursuant to section 415-a of the New York Vehicle and Traffic Law and section 436 of the New York City Charter, merely because the violations that the inspection seeks to uncover for administrative purposes also constitute evidence of crimes.

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The State of New York requests that this Court issue a writ of certiorari to review the judgment of the New York Court of Appeals that granted Joseph Burger's motion to suppress physical evidence, vacated his guilty plea, dismissed the counts of Kings County Indictment Number 6972/82 charging criminal possession of stolen property, and remitted the case to the New York Supreme Court, Kings County for further proceedings. That judgment reversed an order of the Appellate Division of the Supreme Court, Second Judicial Department, which had affirmed Burger's judgment of conviction.

Opinions Below

The opinion of the New York Court of Appeals is reported at 67 N.Y.2d 338, ____ N.Y.S.2d ____ (1986). The opinion of the Appellate Division is reported at 112 A.D.2d 1046, 493 N.Y.S.2d 34 (2d Dep't 1985). The opinion of the trial court

following reargument is reported at 125 Misc.2d 709, 479 N.Y.S.2d 936 (Sup. Ct. Kings County 1984). The original opinion of the trial court is not reported. Each of these opinions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the New York Court of Appeals was rendered on May 8, 1986. This petition for certiorari was filed within the time specified by the order dated June 18, 1986 of the Honorable Thurgood Marshall, Associate Justice of this Court, which extended the time for filing the petition to and including July 18, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved
(reproduced at pp. 22a-24a of the Appendix to this petition)

1. United States Constitution, Fourth Amendment

2. New York Vehicle and Traffic Law § 415-a

3. New York City Charter § 436

STATEMENT OF THE CASE

Introduction

The defendant, Joseph Burger, was convicted upon a plea of guilty of possessing stolen property on November 17, 1982, at an automobile junkyard that he owned in Brooklyn. At about 12:00 noon on that date, five plainclothes New York City police officers assigned to the Auto Crimes Division conducted a routine warrantless administrative inspection of the junkyard. During this inspection, the officers discovered and seized several items of property that had been reported stolen: one automobile, parts of another, a wheelchair, and a walker. The

defendant was arrested during the inspection, and was indicted on multiple counts of criminal possession of stolen property (N.Y. Penal Law §§ 165.40, 165.45[1], [3]) as well as one count of unregistered operation as a vehicle dismantler (N.Y. Veh. & Traf. Law § 415-a[1]).

The Motion to Suppress Physical Evidence

The defendant moved to suppress the physical evidence recovered from the defendant's junkyard during the inspection, on the ground that section 415-a(5) of the New York Vehicle and Traffic Law, which authorized the inspection, violates the fourth amendment of the United States Constitution. The Supreme Court, Kings County conducted a hearing on the defendant's motion. One of the police officers who carried out the inspection, John Vega, was the only witness called by the State at the hearing. The defendant testified on his own behalf and called no other witnesses.

The hearing testimony showed that the defendant's junkyard was open for business when the officers arrrived to conduct the inspection at 12:00 noon on November 17, 1982. As the officers approached the yard, Officer Vega saw, through the open chain link gate, two workers using a torch to dismantle a truck. The yard contained numerous vehicles and parts of vehicles, and there were no buildings in the yard.

The officers entered the yard and approached the defendant at the front gate. In response to Officer Vega's inquiries, the defendant identified himself as the owner of the yard and stated that he did not have a license to dismantle vehicles. In answer to a question by Vega, the defendant further stated that he did not have a "police book."[1] Vega told the defendant that

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1 A "police book" is the record of vehicles and parts that a vehicle dismantler is required to maintain pursuant to N.Y. Veh. & Traf. Law § 415-a(5)(a). *People v. Burger*, 67 N.Y.2d at 340 n.1, Appendix at 3a n.1.

the officers were going to conduct an inspection pursuant to section 415-a of the Vehicle and Traffic Law.[2]

The officers proceeded to record the vehicle identification numbers of about five vehicles and parts of vehicles. One of the officers copied the serial number from a wheelchair that was leaning against a dumpster in the center of the yard, and also observed a handicapped person's walker on top of the dumpster. After calling in the vehicle identification numbers and the serial number by radio and by public telephone, the police learned that two of the automobiles had been reported stolen, and that a wheelchair and a walker had been in one of them. The police arrested the defendant and seized the property. Officer Vega estimated that the inspection was completed about one-half hour after the police had arrived.

After the suppression hearing, the court rejected the defendant's claim that N.Y. Veh. & Traf. Law § 415-a(5) violates the fourth amendment. In a decision dated April 12, 1984, the court therefore denied the motion to suppress the physical evidence seized from the defendant's junkyard. The hearing court concluded that the automobile junkyard industry was "pervasively regulated" within the meaning of this Court's decisions in *United States v. Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and was therefore a proper subject for a warrantless administrative inspection scheme. The hearing court concluded, in addition, that section 415-a(5) properly limited the time, place, and scope of the searches it authorized, and thus satisfied constitutional requirements. Appendix at 18a-19a.

The hearing court granted reargument of the defendant's motion in light of the subsequent decision of the Appellate

2 Vega testified that the function of the Auto Crimes Division was to conduct daily inspections of vehicle dismantlers' yards. The officers typically conducted about five to ten inspections per day. Moreover, the standard procedure of the Auto Crimes Division allowed the police to proceed with an inspection even when the dismantler failed to produce a police book.

Division in *People v. Pace*, 101 A.D.2d 336, 475 N.Y.S.2d 443 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 684, 491 N.Y.S.2d 618, 481 N.E.2d 250 (1985). *Pace* concerned an analogous local ordinance, New York City Charter § 436, which authorizes warrantless inspections of junkyards and other businesses dealing in secondhand merchandise. In *Pace* the court suppressed evidence obtained as a result of such a search, rejecting the claim that the search was authorized by section 436. The court reached that result not by holding section 436 unconstitutional, but rather by holding that the search at issue was not in fact authorized by section 436 because it was prompted solely by advance suspicion of criminal activity and therefore was not undertaken for adminstrative purposes.

On reargument in this case, the defendant urged the court to apply the *Pace* analysis, but the court distinguished *Pace* on its facts. The hearing court specifically found that in this case, unlike in *Pace*, "when the officers arrived at the defendant's yard, they had no reason to believe that the defendant may be dealing in stolen goods," 125 Misc.2d at 714, 479 N.Y.S.2d at 940, Appendix at 16a, and therefore the inspection of the defendant's yard was conducted for administrative purposes. Thus, the inspection in this case was authorized by New York City Charter § 436 as well as by N.Y. Veh. & Traf. Law § 415-a(5). In a decision dated June 11, 1984, the hearing court accordingly adhered to its previous determination and denied the defendant's motion to suppress the property seized as a result of the inspection. 125 Misc.2d 709, 479 N.Y.S.2d 936, Appendix at 11a-17a.

The Guilty Plea and the Sentence

On June 27, 1984, the defendant pled guilty to criminal possession of stolen property in the second degree (N.Y. Penal Law § 165.45[3]). The defendant entered the plea in full satisfaction of the charges contained in Kings County Indictment Number 6972/82 as well as the charges contained in a second indictment.

On August 15, 1984, the court sentenced the defendant as a second felony offender to a term of imprisonment of one and one-half to three years.[3]

The Appeals

The Appellate Division, Second Judicial Department affirmed the judgment of conviction in an opinion dated August 19, 1985.[4] The Appellate Division, which has factfinding power, N.Y. Crim. Proc. Law § 470.15(1), rejected the defendant's claim that the police were merely using the guise of an administrative inspection as a pretext to gather evidence of a crime. The Appellate Division held, rather, that the inspection of the defendant's junkyard was properly conducted for administrative purposes in accordance with the provisions of the Vehicle and Traffic Law and the New York City Charter. The court rejected the defendant's claim that N.Y. Veh. & Traf. Law § 415-a violates the fourth amendment, and upheld the constitutionality of both that statute and New York City Charter § 436. 112 A.D.2d 1046, 493 N.Y.S.2d 34, Appendix at 9a-10a.

The New York Court of Appeals reversed the order of the Appellate Division and held that both N.Y. Veh. & Traf. Law § 415-a(5) and New York City Charter § 436 violate the fourth amendment of the United States Constitution. The Court of Appeals held that these statutes authorize searches "undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme," 67 N.Y.2d at 344,

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3 The defendant remains at liberty on $2,500 bail pursuant to an order of the Chief Judge of the New York Court of Appeals dated October 16, 1985. 66 N.Y.2d 761. That order continued the bail set by the Supreme Court, Kings County, by an order dated August 15, 1984, which granted the defendant's motion pursuant to N.Y. Crim. Proc. Law § 460.50 for a stay of execution of the judgment pending determination of his appeal to the Appellate Division.

4 The New York Criminal Procedure Law provides that a guilty plea does not waive the right to appeal an order denying a pretrial motion to suppress evidence. N.Y. Crim. Proc. Law § 710.70(2).

Appendix at 7a, and are for that reason unconstitutional. The court noted that the licensing and record-keeping requirements of section 415-a did suggest an administrative scheme, and held, moreover, that the statutory authorization to conduct unannounced warrantless inspections of the required books and records is constitutionally permissible. *Id.* at 344, Appendix at 8a. The Court of Appeals nevertheless concluded that N.Y. Veh. & Traf. Law § 415-a(5)(a) violates the fourth amendment because it permits searches of vehicles and vehicle parts "notwithstanding the absence of any records against which the findings of such a search could be compared," *id.* at 344-45, Appendix at 8a, and because it authorizes searches by police officers as well as by other regulatory agents, *id.* at 344, Appendix at 7a. The Court of Appeals therefore granted the defendant's motion to suppress physical evidence, vacated his guilty plea, dismissed the counts of Indictment Number 6972/82 charging criminal possession of stolen property, and remitted the case to the trial court for further proceedings. 67 N.Y.2d 338, Appendix at 1a-8a.

This petition for certiorari challenges the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Creates a Conflict Among the Decisions of the State Courts of Last Resort, and with a Decision of this Court, Concerning the Circumstances in which the Constitution Permits Warrantless Administrative Inspections of Commercial Premises.

Solely on fourth amendment grounds,[5] the court below invalidated a state statute and a city ordinance that authorize warrantless inspections of vehicle dismantling businesses, automobile junkyards, and other businesses dealing in secondhand merchandise. This federal constitutional determination by the New York Court of Appeals is at odds with the decisions of five other state courts of last resort, each of which rejected fourth amendment challenges to warrantless inspection statutes that are similar to the provisions challenged in this case. In addition, the decision below is inconsistent with the decision of this Court in *United States v. Biswell*, 406 U.S. 311 (1972). Each of these conflicts warrants the grant of certiorari to review the judgment in this case.

At least five state courts of last resort have upheld the constitutionality of statutes similar to those struck down by the court below. *See Moore v. State*, 442 So.2d 215 (Fla. 1983); *State v. Tindell*, 272 Ind. 479, 399 N.E.2d 746 (1980); *State v. Barnett*, 389 So.2d 352 (La. 1980); *State v. Wybierala*, 305 Minn. 455, 235 N.W.2d 197 (1975); *Shirley v. Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977). In two additional states, intermediate appellate courts have reached the same result. *People v. Easley*, 90 Cal. App.3d 440, 153 Cal. Rptr. 396 (Ct.

5 The decision below twice refers explicitly to the fourth amendment, 67 N.Y.2d at 343, Appendix at 6a, 7a, never refers to the New York Constitution, and relies extensively on decisions of this Court construing the fourth amendment. Moreover, the defendant has consistently framed his claim in federal constitutional terms. The decision below thus indisputably rests solely on the fourth amendment of the United States Constitution.

App.), *cert. denied*, 444 U.S. 899 (1979); *People v. Barnes*, 146 Mich. App. 37, 379 N.W.2d 464 (1985). In each of those cases, the state court rejected a fourth amendment challenge to a statute that authorized warrantless inspections of automobile junkyards, repair shops, manufacturers, or dealers, or of dealers in secondhand goods. The statute in question in each of those cases, as in this case, permits inspection of merchandise on the business premises regardless of whether any required records are produced. In addition, each statute authorizes inspections that seek to uncover criminal evidence at the same time that the inspections further a regulatory objective. Moreover, each statute permits police officers to conduct the inspections. These aspects of N.Y. Veh. & Traf. Law § 415-a(5)(a) and New York City Charter § 436 led the New York Court of Appeals to conclude that the warrantless inspections authorized by the statutes served no administrative purpose, and therefore violated the fourth amendment. 67 N.Y.2d at 343-45, Appendix at 6a-8a. Faced with the same constitutional challenge to materially identical statutes, however, the state courts of last resort in Florida, Indiana, Louisiana, Minnesota, and Virginia, as well as intermediate appellate courts in California and Michigan, all reached the opposite conclusion. This conflict among the state courts alone warrants the grant of certiorari to review the decision below.

The decision below also conflicts with this Court's decision in *United States v. Biswell*, 406 U.S. 311 (1972). In *Biswell* this Court rejected a fourth amendment challenge to a statute that authorizes warrantless inspections of the business premises of federally licensed firearms dealers. That statute permits inspection of a dealer's firearms or ammunition regardless of the presence of required records, *see* 18 U.S.C. § 923(g),[6] just as

6 The statute upheld in *Biswell* provides, in relevant part:

> The Secretary [of the Treasury] may enter during business hours the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . .

(footnote continued on following page)

N.Y. Veh. & Traf. Law § 415-a(5)(a) authorizes inspection of a dismantler's vehicles and parts regardless of the presence of a police book. Moreover, the statute in *Biswell*, like the statutes in this case, authorizes inspections designed to uncover evidence of a crime. Indeed, the defendant in *Biswell* was convicted of a federal crime as a result of the seizure of two sawed-off rifles during the warrantless inspection of his pawn shop. 406 U.S. at 312-13. Yet, despite these similarities between the New York statutes in this case and the statute at issue in *Biswell*, the court below and the *Biswell* Court reached contrary constitutional conclusions.

This Court should grant the writ of certiorari to review the judgment below and to resolve both of these conflicts.

II. The Decision Below Squarely Presents a Significant and Recurring Question Concerning the Constitutionality of Statutes that Authorize Warrantless Administrative Inspections of Commercial Premises.

This case presents an important fourth amendment question that implicates the state interests in controlling the epidemic of motor vehicle theft and in regulating industries uniquely associated with that problem, as well as the privacy interests of numerous vehicle dismantlers, junkyard owners, and secondhand merchandise dealers in their business premises.

The magnitude of the state interest in controlling motor vehicle theft is evident. The prevalence of the problem of motor vehicle theft in New York is concretely documented in the legislative history of N.Y. Veh. & Traf. Law § 415-a.[7] The

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and (2) any firearms or ammunition kept or stored by such . . . dealer at such premises.

18 U.S.C. § 923(g), *quoted in United States v. Biswell*, 406 U.S. at 311-12 & n.1.

7 In the Governor's memorandum approving a 1979 amendment to the statute, he noted that in 1976 "over 130,000 automobiles were reported stolen in New York, resulting in losses in excess of $225 million," and that motor vehicle theft in the State was "rapidly increasing." Governor's Memorandum approving L. 1979, chs. 691, 692, 1979 N.Y. Laws 1826.

national scope of the problem is evinced by the number of states that have enacted statutes authorizing warrantless inspections of vehicle dismantling businesses, junkyards, and other businesses involving motor vehicles, and by the state court decisions upholding those statutes. *E.g.*, *People v. Easley*, 90 Cal. App.3d at 445, 153 Cal. Rptr. at 399 (automobile dismantling industry is "fraught with public danger" of criminal activity); *Moore v. State*, 442 So.2d at 216 (Fla.) (motor vehicle theft is "widespread and on the increase"); *People v. Barnes*, 146 Mich. App. at 42, 397 N.W.2d at 466 ("automobile theft and the stripping of stolen automobiles to salvage parts are significant national problems which deserve significant governmental attention").

In addition, the discovery of criminal evidence through inspection of these businesses not only furthers New York's interest in prosecuting crimes related to trafficking in stolen property, but simultaneously furthers the independent administrative objective of determining whom the Commissioner of Motor Vehicles should license to operate as a vehicle dismantler. Section 415-a requires a registration as a prerequisite to engaging in that business, N.Y. Veh. & Traf. Law § 415-a(1), and provides that the decision to issue or to revoke a registration may depend on whether the applicant or registrant has been convicted of any crimes relating to motor vehicle theft or to illegal possession of stolen vehicles or parts, *id.* § 415-a(2), (6)(a). Moreover, in light of the ease with which a dismantler's possession of stolen property can be corrected in anticipation of a particular inspection, frequent and unannounced warrantless inspections are essential to furtherance of the State's objectives. *See Donovan v. Dewey*, 452 U.S. 594, 602-03 (1981) (upholding statute authorizing warrantless inspections of mines because many mine safety or health hazards could be easily concealed if advance warning of inspection were obtained); *United States v. Biswell*, 406 U.S. at 316 (upholding statute authorizing warrantless inspections of firearms dealers because they could easily conceal or correct violations on short notice).

The constitutional conclusion of the court below is erroneous, and thus unnecessarily jeopardizes the important state

interests served by the statutes. The court unjustifiably determined that the statutes further no administrative purposes. Moreover, the distinction set forth by the court between the kinds of inspections that are constitutionally permissible and those that are impermissible is both contradictory and unreasonable.

First, the court below erroneously concluded that uncovering evidence of criminality is the sole purpose furthered by the statutorily-authorized inspections. 67 N.Y.2d at 344, Appendix at 7a. The court reasoned that because the inspections served no administrative purpose, they could not be conducted without a warrant. However, section 415-a itself shows that the inspections further the objective, in addition to uncovering criminal evidence, of determining whom should be licensed to operate as a vehicle dismantler. Thus, insofar as the decision below rests on the court's conclusion that the inspections authorized by the statutes serve no administrative purpose, the decision is incorrect.

Second, the court drew an unsupportable distinction between the scope of permissible and impermissible inspections. The court held that the warrantless search of the defendant's junkyard was impermissible because it was purportedly conducted solely to uncover evidence of criminality. The court stated that the fourth amendment would permit, on the other hand, unannounced inspections of required books and records, and apparently of vehicles and vehicle parts for the purpose of comparing them to the records. 67 N.Y.2d at 344-45, Appendix at 8a. Yet, because an examination of books and records is designed to insure compliance with the licensing requirements as well as the record-keeping requirements of the statute, and because operating as a vehicle dismantler without the required registration is a felony, N.Y. Veh. & Traf. Law § 415-a(1), uncovering evidence of criminality is the purpose of an inspection of books and records no less than it is the purpose of a direct inspection of vehicles and parts. Indeed, because the very failure to produce the required records or to permit an inspection is a crime, *id.* § 415-a(5)(a), evidence of a crime can

be uncovered by a mere attempt to inspect books and records. In short, an inspection directed only to books and records is itself designed to uncover criminal evidence. Thus, the court below contradicted its own constitutional standard when it concluded that the Constitution permits warrantless inspections of required books and records, but not inspections of vehicles and parts in the absence of required records.

Moreover, the court's suggestion that a statute could permissibly authorize inspections of vehicles and parts for the purpose of comparing them to records, but not otherwise, is another irrational constitutional distinction. This distinction bestows on vehicle dismantlers the power to control the scope of inspections, because a dismantler could thwart any inspection of merchandise by simply refusing to produce any records and choosing instead to risk the lesser penalties associated with that refusal.[8]

Finally, the court below invalidated the statutes partly because they authorize police officers, rather than only other regulatory agents, to conduct the inspections. 67 N.Y.2d at 344, Appendix at 7a. This aspect of the statutes is wholly unrelated to either the state interests or the privacy interests implicated by the statutes. Therefore, to the extent that the court below struck down the statutes simply because they grant authority to police officers to conduct the inspections, the decision below rests on a flawed fourth amendment analysis.

The petition for certiorari thus should be granted so that this Court can properly decide the significant fourth amendment question presented by this case. Indeed, the need for this Court's clarification of this area of the law is underscored by

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8 Criminal possession of stolen property valued in excess of $1,500 is a class D felony punishable by an indeterminate prison term of up to two and one-third to seven years. N.Y. Penal Law §§ 70.00(1), (2)(d), (3)(d), 165.50. By contrast, refusing to produce the records that a vehicle dismantler is required to keep is a class A misdemeanor punishable by a maximum determinate prison term of only one year. N.Y. Veh. & Traf. Law § 415-a(5)(a); N.Y. Penal Law § 70.15(1)(a).

People v. Krull, 107 Ill.2d 107, 481 N.E.2d 703 (1985), *cert. granted*, 106 S. Ct. 1456 (1986), which is pending before this Court. *Krull*, like this case, concerns the admissibility of physical evidence seized by police officers pursuant to a statute that authorizes warrantless inspections of automobile junkyards. The only question presented in *Krull*, however, is whether the good faith exception to the exclusionary rule should apply because the search was conducted before any court had held that the statute violated the fourth amendment. The State in that case does not contend that the statute itself is constitutional.[9] *See* Petitioner's Brief on the Merits, *Illinois v. Krull*. This case, unlike *Krull*, squarely presents the question whether the statutes that authorized the inspection of the defendant's junkyard are constitutional.

It is far more important for this Court to decide the underlying question of constitutional standards for administrative inspections in this area, than to decide the derivative question, presented by *Krull*, of what to do while the law is unclear. Clarification of the constitutional status of these statutes will minimize the occasions for reliance on a good faith exception to the exclusionary rule, which has the unhappy effect of validating a concededly illegal search. If this Court decides whether statutes of this type are constitutional,[10] the courts will seldom be called on to approve illegal administrative searches undertaken in good faith, as urged by the State in *Krull*.

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9 . The statute at issue in *Krull* may well satisfy constitutional standards, but, perhaps because it has been repealed, the State in that case does not press that point.

10 Because this case concerns the constitutionality of both a state statute and a city ordinance, each of which independently authorizes warrantless inspections of junkyards, the case presents an opportunity for additional illustration and clarification of the relevant fourth amendment principles by applying them to both provisions.

CONCLUSION

The states are faced with a pervasive and pressing need to regulate certain industries whose operation will otherwise inflict widespread public harm by facilitating trafficking in stolen motor vehicles. This case concerns the extent to which the limited privacy interests of vehicle dismantlers in their junkyards should preclude the states from effectively addressing this problem, and illustrates the uncertainty regarding the proper resolution of this question. That uncertainty has given rise to a conflict between the decision below and this Court's decision in *Biswell*, a conflict among the state courts of last resort, and conflicts between state legislatures and courts. This Court should grant the writ of certiorari to decide this important fourth amendment question.

Respectfully submitted,

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July 18, 1986

APPENDIX

COURT OF APPEALS
STATE OF NEW YORK

No. 135

Argued March 19, 1986; decided May 8, 1986

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

JOSEPH BURGER,

Appellant.

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered August 19, 1985, which affirmed a judgment of the Supreme Court (A. Frederick Meyerson, J., at plea and sentencing; Lewis L. Douglass, J., at suppression hearing; opn 125 Misc 2d 709), rendered in Kings County, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the second degree.

People v Burger, 112 AD2d 1046, reversed.

POINTS OF COUNSEL

Stephen R. Mahler for appellant. I. New York City Charter § 436 and Vehicle and Traffic Law § 415-a (5) (a) are facially unconstitutional and, regardless, were implemented in this case in a manner violative of appellant's constitutional rights. (*People v Cusumano*, 108 AD2d 752; *People v Pace*, 101 AD2d 336, 65 NY2d 684; *Bionic Auto Parts & Sales v Fahner*, 721

F2d 1072; *Flacke v Onondaga Landfill Sys.*, 127 Misc 2d 984; *Donovan v Dewey*, 452 US 594; *Matter of Glenwood TV v Ratner*, 65 NY2d 642; *People v Rizzo*, 40 NY2d 425; *People v Sciacca*, 45 NY2d 122; *Matter of Finn's Liq. Shop v State Liq. Auth.*, 24 NY2d 647; *United States v Chicago R. R. Co.*, 282 US 311.) II. Assuming, arguendo, that the police lawfully entered the junkyard in the first instance, they nevertheless had no legal justification for seizing any property found therein without first securing a search warrant. (*People v Lee*, 58 NY2d 771; *People v Langen*, 60 NY2d 170; *People v Gokey*, 60 NY2d 309; *People v Smith*, 59 NY2d 454; *People v Arnau*, 58 NY2d 27.)

Elizabeth Holtzman, District Attorney (*Leonard Joblove* and *Barbara D. Underwood* of counsel), for respondent. I. The administrative inspection of defendant's junkyard was constitutionally permissible. (*Donovan v Dewey*, 452 US 594; *People v Rizzo*, 40 NY2d 425; *United States v Biswell*, 406 US 311; *Marshall v Barlow's, Inc.*, 436 US 307; *Matter of Glenwood TV v Ratner*, 103 AD2d 322, 65 NY2d 642; *Broadrick v Oklahoma*, 413 US 601; *People v Drayton*, 39 NY2d 580; *People v Merolla*, 9 NY2d 62, 365 US 872; *O'Kane v State of New York*, 283 NY 439; *Peterman v Coleman*, 764 F2d 1416.) II. The warrantless seizure of the stolen property was necessary to avoid risking its disappearance. (*People v Ciaccio*, 45 NY2d 626; *People v Farenga*, 42 NY2d 1092; *Illinois v Andreas*, 463 US 765; *People v Brosnan*, 32 NY2d 254; *Chambers v Maroney*, 399 US 42; *People v Basilicato*, 64 NY2d 103; *Texas v Brown*, 460 US 730; *People v Pace*, 65 NY2d 684; *People v Spinelli*, 35 NY2d 77.)

OPINION OF THE COURT

ALEXANDER, J.

We hold today that Vehicle and Traffic Law § 415-a (5) (a), which authorizes warrantless inspections of vehicle dismantling businesses, and New York City Charter § 436, which authorizes warrantless searches of junkyards and other businesses storing used, discarded or secondhand merchandise, violate the constitutional proscription against unreasonable searches and seizures.

Defendant Joseph Burger is the owner of a junkyard in Brooklyn. Part of his business consists of dismantling automobiles and selling their parts. At about 12:00 noon on November 17, 1982, five plain-clothes New York City police officers assigned to the Auto Crimes Division entered defendant's junkyard, which was enclosed by a metal fence. According to the testimony of one of the officers, there were no buildings in the yard and it contained numerous vehicles and parts of vehicles. Defendant was present at the time, and the officers inquired as to whether he was licensed to dismantle vehicles. Defendant replied that he was not and informed the officers in response to their questions that he did not have a "police book".[1] The police told defendant that they were going to perform a warrantless inspection pursuant to Vehicle and Traffic Law § 415-a.[2]

In the course of the inspection, the officers copied down the vehicle identification numbers (VINs) of several vehicles and parts of vehicles. The police also recorded the serial numbers

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1. A "police book" refers to the record of all vehicles and parts in the possession of a vehicle dismantler required to be kept by Vehicle and Traffic Law § 415-a (5) (a).

2. Vehicle and Traffic Law § 415-a provides in part: "5. Records and identification. (a) * * * Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. * * * Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises * * * The failure to produce such records or permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor."

from a wheelchair and a handicapped person's walker that were found alongside a dumpster. After checking the VINs and the serial numbers, the officers determined that two of the automobiles had been reported stolen, and that a wheelchair and a walker had been in one of them. The property was seized and defendant was charged with two counts of criminal possession of stolen property in the second degree (Penal Law § 165.45 [1] [3]), three counts of criminal possession of stolen property in the third degree (Penal Law § 165.40) and unregistered operation as a vehicle dismantler (Vehicle and Traffic Law § 415-a [1]). Following denial of defendant's motion to suppress the physical evidence and statements made by him to the arresting officer, defendant pleaded guilty to criminal possession of stolen property in the second degree.

At the hearing on defendant's motion to suppress, one of the officers, John Vega, testified that the function of the Auto Crimes Division was to make daily inspections of vehicle dismantlers' yards and that his unit typically conducted about 5 to 10 inspections a day. Officer Vega did not know how defendant's yard was chosen for inspection that day. He stated that when a police book is not available to check against a yard's inventory, it is normal procedure to record a random sample of VINs and to determine if any of the vehicles had been reported stolen.

The hearing court denied the motion to suppress, holding that the auto junkyard industry is "pervasively regulated" (*see, United States v Biswell*, 406 US 311; *Colonnade Catering Corp. v United States*, 397 US 72) and that Vehicle and Traffic Law § 415-a is constitutional inasmuch as it is sufficiently limited in time, place and scope. Thereafter, reargument of the motion was granted in light of an Appellate Division decision in *People v Pace* (101 AD2d 336, *affd* 65 NY2d 684) that implied in a footnote that section 415-a requires the police to obtain a search warrant in instances where the junkyard owner cannot produce a police book (101 AD2d, at p 339, n 1). Upon reargument, the court adhered to its previous determination, holding that the statute's language authorizes the warrantless inspection of vehicles and parts that are the subject of its

record-keeping requirements and that, unlike the situation in *Pace*, the search in this case was undertaken pursuant to an administrative scheme and not simply as a quest for evidence prompted by police suspicion of criminal activity.

The Appellate Division affirmed, holding that "[i]n the instant case, the police were seeking to administer the regulatory schemes set forth in Vehicle and Traffic Law § 415-a and New York City Charter § 436.[3] The constitutionality of these statutory provisions has recently been upheld by this court in *People v Cusumano* (108 AD2d 752)." (112 AD2d 1046.)

On this appeal, defendant argues that Vehicle and Traffic Law § 415-a and New York City Charter § 436 are facially unconstitutional in that, regardless of the auto junkyard business' status as a closely regulated industry, they authorize warrantless searches that are not designed to further any administrative objective. The People respond that the statutes further the substantial State interest in controlling automobile theft by establishing an administrative scheme requiring automobile dismantlers to be licensed and registered and to maintain detailed records of their inventory showing proof of ownership. The People further argue that by permitting unannounced warrantless searches the statutes allow the police to carry out the State's objective while adequately protecting a junkyard owner's diminished privacy interest.

We previously have had occasion, in *People v Pace* (101 AD2d 336, *affd* 65 NY2d 685, *supra*), to pass on the validity of a junkyard search purportedly undertaken by the police pursuant to the authority of New York City Charter § 436. There, the Appellate Division held, and we agreed, that the search had been undertaken in order to gather evidence of crime, which

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3. New York City Charter § 436 provides that: "The [police] commissioner shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession".

the police already had reason to believe had been or was taking place. Thus, the warrantless search could not be validated by reference to the statute and it was, therefore, unnecessary to examine the statute's constitutionality (*see also, People v Brigante*, 115 AD2d —; *People v Sullivan*, 129 Misc 2d 747). Here, by contrast, the constitutional question is squarely presented since we have before us the type of search contemplated by the statutes.

It is well settled that the Fourth Amendment prohibition against unreasonable searches and seizures is applicable to commercial premises (*e.g., Donovan v Dewey*, 452 US 594, 598, *supra*; *Marshall v Barlow's, Inc.*, 436 US 307, 311-313; *Michigan v Tyler*, 436 US 499, 504-505; *See v City of Seattle*, 387 US 541, 545-546; *Sokolov v Village of Freeport*, 52 NY2d 341; *Matter of Glenwood TV v Ratner*, 103 AD2d 322, 327, *affd* 65 NY2d 642, *appeal dismissed*— US —, 106 S Ct 241). With respect to "certain carefully defined classes of cases" (*Michigan v Clifford*, 464 US 287, 292, & n 2) involving industries that are deemed "pervasively regulated", administrative searches are excepted from the general rule requiring warrants. In order to validate a warrantless administrative search, however, the commercial premises must be part of a pervasively regulated industry and the search itself must be part of a regulatory scheme designed to further an urgent State interest (*e.g., Donovan v Dewey*, 452 US 594, 599-600, *supra; United States v Biswell*, 406 US 311, *supra; Colonnade Catering Corp. v United States*, 387 US 72, *supra*). Also, the State's ability to conduct warrantless inspections must be essential to the effectuation of an administrative scheme (*Donovan v Dewey*, 452 US, at pp 600, 602-603, *supra; United States v Biswell*, 406 US, at p 316, *supra; Bionic Auto Parts & Sales v Fahner*, 721 F2d 1072, 1077). Finally, the inspection must be authorized by a valid statute that is carefully limited in time, place and scope (*e.g., Donovan v Dewey*, 452 US, at pp 603-604; *United States v Biswell*, 406 US, at pp 315-316).

The Supreme Court has distinguished valid administrative inspections from searches that are used to obtain evidence of

criminality (*see, e.g., Donovan v Dewey*, 452 US 594, 598, & n 6, *supra; Camara v Municipal Ct.*, 387 US 523, 530, 535; *see also, Michigan v Tyler*, 436 US 499, 504-506, *supra*). In short, an administrative search must serve an administrative purpose; when designed instead to uncover evidence of a crime the traditional requirements of the Fourth Amendment apply (*see, e.g., Donovan v Dewey*, 452 US, at p 598, n 6; *Michigan v Tyler*, 436 US, at p 512).

The fundamental defect in the statutes before us is that they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. The asserted "administrative schemes" here are, in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property. Furthermore, an otherwise invalid search of private property is not rendered reasonable merely because it is authorized by a statute, for to so hold would allow legislative bodies to override the constitutional protections against unlawful searches.

Examination of the statutory schemes authorizing warrantless searches upheld by the Supreme Court reveals the shortcomings of the statutes under consideration. In *Donovan v Dewey* (*supra*), the court upheld warrantless inspections of mines authorized by the Federal Mine Safety and Health Act of 1977 (91 US Stat 1290, 30 USC § 801 *et seq.*) to determine compliance with health and safety standards promulgated by the Secretary of Labor pursuant to the Act. In *United States v Biswell* (406 US 311, *supra*), the court upheld warrantless searches of the premises of firearms dealers authorized by the Gun Control Act of 1968 (82 US Stat 1213, 18 USC *et seq.*) to determine compliance with the licensing, record-keeping and occupational tax requirements of that statute. Significantly, in both instances the administrative statutes authorize warrantless inspections to be conducted by agents of the regulatory agency, not police officers.

By contrast, New York City Charter § 436 and Vehicle and Traffic Law § 415-a do little more than authorize general searches, including those conducted by the police, of certain commercial premises. In conducting a search pursuant to

section 436 the police clearly are not determining compliance with any administrative or regulatory scheme. Indeed, this provision contains no record-keeping requirements. Rather, it explicitly authorizes searches to be undertaken "in connection with the performance of *any* police duties" (emphasis added). Vehicle and Traffic Law § 415-a does contain some suggestion of an administrative scheme by imposing licensing and record-keeping requirements, and it authorizes inspectors to make unannounced visits to regulated premises to examine required books and records, as it may properly do (*see, e.g., Matter of Glenwood TV v Ratner*, 65 NY2d 642, *affg on opn of* Titone, J., at 103 AD2d 322, *appeal dismissed* —US—, 106 S Ct 241, *supra*). It fails to satisfy the constitutional requirements for a valid, comprehensive regulatory scheme, however, inasmuch as it permits searches, such as conducted here, of vehicles and vehicle parts notwithstanding the absence of any records against which the findings of such a search could be compared. Defendant admitted prior to the search that he did not have a police book. Thus, as Officer Vega admitted, the ensuing search was undertaken solely to discover whether defendant was storing stolen property on his premises. Indeed, the People concede in their brief (at 22) that "[t]he immediate purpose of inspecting a vehicle dismantler's junkyard is to determine whether the dismantler's inventory includes stolen property." Because New York City Charter § 436 and Vehicle and Traffic Law § 415-a (5) (a) permit such warrantless searches, they are facially unconstitutional.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress granted, defendant's guilty plea vacated, the counts of the indictment charging criminal possession of stolen property dismissed, and the case remitted to Supreme Court, Kings County, for further proceedings pursuant to CPL 470.55 (2).

Chief Judge WACHTLER and Judges MEYER, SIMONS, KAYE, TITONE and HANCOCK, JR., concur.

Order reversed, etc.

APPELLATE DIVISION OF THE
NEW YORK SUPREME COURT
SECOND JUDICIAL DEPARTMENT

No. 644 E

August 19, 1985

Mahler & Harris, P.C., Kew Gardens, N.Y. (Stephen R. Mahler of counsel), for appellant.

Elizabeth Holtzman, District Attorney, Brooklyn, N.Y. (Barbara D. Underwood, Peter A. Weinstein and Leonard Joblove of counsel), for respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSEPH BURGER, Appellant.—Appeal by defendant from a judgment of the Supreme Court, Kings County (Meyerson, J.), rendered August 15, 1984, convicting him of criminal possession of stolen property in the second degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review the denial (Douglass, J.), of defendant's renewed motion to suppress certain evidence.

Judgment affirmed. This case is remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50 (5).

Citing this court's opinion in *People v Pace* (101 AD2d 336, *affd* 65 NY2d 684), defendant claims that the warrantless inspection of his automobile junkyard by the police violated his constitutional rights. The instant case is, however, clearly distinguishable from *People v Pace* (*supra*). In *Pace*, the police used the pretext of an administrative inspection to conduct an unconstitutional warrantless search for evidence of a crime. In the instant case, the police were seeking to administer the regulatory schemes set forth in Vehicle and Traffic Law § 415-a and New York City Charter § 436. The constitutionality of these statutory provisions has recently been upheld by this court (*People v Cusumano*, 108 AD2d 752).

Upon review of the record, we find no merit to defendant's claim that, as in *Pace* (*supra*), the police were using the administrative inspection as a pretext to gather evidence of a crime. Thus, the conduct of the police was proper and the judgment should be affirmed. Mangano, J.P., Thompson, Brown and Kunzeman, JJ., concur.

NEW YORK SUPREME COURT
CRIMINAL TERM
KINGS COUNTY

June 11, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

—v—

JOSEPH BURGER,

Defendant.

APPEARANCES OF COUNSEL

Mahler & Harris, P.C. (*Stephen Mahler* of counsel), for defendant. *Elizabeth Holtzman, District Attorney* (*Catherine Wilder* of counsel), for plaintiff.

OPINION OF THE COURT

LEWIS L. DOUGLASS, J.

On May 12, 1983, defendant Burger moved to suppress physical evidence seized from his business premises on the grounds that subdivision 5 of section 415-a of the Vehicle and Traffic Law was unconstitutional. That motion was denied, after a hearing, in a decision by this court dated April 12, 1984.

On April 30, 1984, the Appellate Division decided *People v Pace* (101 AD2d 336). Alleging that the *People v Pace* (*supra*) decision requires a result contrary to that reached by this court in the suppression hearing, defendant requested a renewal and reargument of the previously denied suppression motion and asked for proper and equitable relief. In consideration of the relevant issues of law developed by the Appellate Division in *People v Pace* (*supra*), reargument was granted.

FACTS

Defendant Burger is in the auto junkyard business. His business premises are an open yard containing vehicles and parts of vehicles. His business consists of dismantling vehicles and selling the vehicle parts.

Police officers assigned to the Auto Crimes Division, which generally handles inspections of auto junkyards and whose officers have received special training, conducted an inspection of the defendant's yard. Upon this inspection, the officers found that the defendant did not have a "police book", which all auto junkyards are required to keep. (See Vehicle and Traffic Law, § 415-a, subd 5, par [a].) Continuing their inspection of the yard, the officers gave the police radio dispatcher the VIN number of a vehicle in the defendant's yard and received information that the vehicle was stolen. Subsequently, the officers arrested the defendant and seized the stolen property.

The issue on reargument is whether the officers of the Auto Crimes Division had the power to enter the defendant's yard and conduct an inspection in the manner and under the circumstances described above.

SUBDIVISION 5 OF SECTION 415-A OF THE VEHICLE AND TRAFFIC LAW

Subdivision 5 of section 415-a of the Vehicle and Traffic Law states that, "[u]pon request of an agent of the commissioner or of any police officer * * * a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this statute".

In the original suppression hearing, this court found that subdivision 5 of section 415-a of the Vehicle and Traffic Law was constitutional. The statute was found to be limited in time, place and scope because the inspection is done during "regular business hours", on "all motor vehicles, trailers and major component parts thereof", and "only those vehicles or parts subject to the record-keeping requirement".

This court also found that defendant's auto junkyard business was a member of a "pervasively regulated" industry. As a member of a pervasively regulated industry, defendant's business may be subjected to warrantless inspections (*Donovan v Dewey*, 452 US 595; *United States v Biswell*, 406 US 311; *Colonnade Corp. v United States*, 397 US 72; *People v Rizzo*, 40 NY2d 425). That is exactly what occurred in this case. Officers of the Auto Crimes Division entered defendant's auto junkyard to conduct a warrantless inspection.

On reargument, defendant alleges that footnote 1* of the majority opinion in *People v Pace* (101 AD2d 336, *supra*) requires the officers to seek a search warrant when the auto junkyard does not produce a police book. The court finds this argument unpersuasive. The footnote merely states that the court did not apply subdivision 5 of section 415-a in *People v Pace* (*supra*). The Appellate Division pointed to the lack of a police book as further evidence that, in that case, the police officers were not conducting an administrative inspection but gathering evidence for criminal prosecution.

Further support for rejection of defendant's allegation is found in the wording and intent of subdivision 5 of section 415-a of the Vehicle and Traffic Law. The statute expressly states that an agent or police officer may examine the records, any vehicles or parts of vehicles which are subject to the record-keeping requirements of the statute. The presence of a police book is not given as a prerequisite to a warrantless inspection of vehicles or parts of vehicles. Obviously, to require a warrant for an inspection of the items in the yard whenever there is no police book would hinder the power of the officers and frustrate the purpose of the statute, which is to discourage auto junkyards from dealing in stolen goods. This concern was

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* The *People v Pace* (*supra*) footnote reads, "Subdivision 5 of section 415-a of the Vehicle and Traffic Law, the statute under which the police officers said they were acting, has no application. While this section requires dismantlers to keep a police book, the book was missing when the officers entered and it would thus have been impossible for the officers to exercise the alleged implied authority to compare the book entries to the contents of the yard."

well put in *People v Tinneny* (99 Misc 2d 962, 969-970), where the court stated the following: "It is unavailing for defendant to contend that only his records but not his inventory were subject to inspection. The purpose of the record keeping is to insure that vehicles or the parts thereof are lawfully dealt with, hence deterring the acquisition and disposition of stolen items. Without the ability to substantiate statutory compliance by visual examination of the defendant's inventory, the intent of the statute, requiring the keeping of the records would be frustrated if not rendered entirely nugatory."

Although it seems proper to find that subdivision 5 of section 415-a of the Vehicle and Traffic Law authorized the Auto Crimes Division officers' inspection of the defendant's yard, this court need not decide this case on subdivision 5 of section 415-a alone. The District Attorney has alleged that, both subdivision 5 of section 415-a of the Vehicle and Traffic Law and section 436 of the New York City Charter permit this inspection.

Section 436 of the New York City Charter

Section 436 of the New York City Charter, which is entitled: "Powers over certain trades", provides the following: "The [police] commissioner shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise or auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise and auctioneer, or any clerk or employee of any thereof shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both."

In *People v Pace* (101 AD2d 336, *supra*), the Appellate Division examined the authority of the police under section 436 of the New York City Charter. In that case, the officers were checking the registration of an automobile when a truck carrying a portion of a car body passed by. When the officers noticed that the VIN plate was removed from the car body, they placed the truck's driver under arrest. At that point, a truck carrying two front ends of late model cars passed by. The officers discovered that the parts came from Economy Auto Salvage, a company owned by the two defendants in that case. When the officers arrived at Economy Auto Salvage, they were told that the police book had been stolen. The officers then "undertook to survey the yard, not for the purposes of an administrative inspection but expressly to gather evidence of a crime." (101 AD2d, at p 338.) The court concluded that "[b]ecause we find that the search undertaken here was not for administrative purposes, we hold that the statute can have no application and reverse." (101 AD2d, at p 337.) The court's decision was based on the fact that the police officers were on a "mission * * * to gather evidence of a crime rather than to administer any regulatory scheme." (101 AD2d, at p 340.) Judge Mangano's dissent points out that, "Although not expressly stated in the majority opinion, it clearly appears that the majority is of the view that the police possessed probable cause to search the junkyard and relied on the pretext of an administrative search to excuse their failure to obtain a search warrant." (101 AD2d, at p 343.) Clearly, the holding in *People v Pace* (*supra*) is that a warrant is not required for an administrative inspection but is required when the inspection is actually a quest for evidence to be used in a criminal prosecution.

The facts in the present case materially differ from the facts in *People v Pace* (*supra*). First of all, the officers in this case were assigned to the Auto Crimes Division, but in *People v Pace* (*supra*), they were regular police officers. Understandably, it is much better, in terms of protecting the defendant's rights, to allow a specialized unit the authority to invade the privacy of a pervasively regulated industry than it is to allow

all police officers to have such powers. Also, the fact that they were Auto Crimes Division officers tends to disprove the argument that the administrative inspection was a pretext for a criminal investigation. Since these officers are assigned to the division that carries out inspections of auto junkyards, it is logical to believe that they were actually conducting an administrative inspection when they showed up at the defendant's place of business.

Also, the lack of evidence of any arousal of suspicion on the part of the officers indicates that there was no reason to gather evidence of a crime. The officers did not stop any trucks or notice any missing VIN plates before going to the defendant's yard. Indeed, when the officers arrived at the defendant's yard, they had no reason to believe that the defendant may be dealing in stolen goods. The fact that the defendant was found to be in possession of stolen property does not prove that the officers entered the yard in order to find stolen property.

The defendant stressed the fact that the officers had no contact with the Department of Motor Vehicles and that there was no set procedure for the inspection of auto junkyards. Both of these factors are irrelevant. The statute expressly states that the police commissioner has the power to administer section 436. Therefore, the officers of the Auto Crimes Division did not have to contact the Department of Motor Vehicles, or any other agency, before conducting an inspection of the defendant's business.

As for the procedure used, it does not run contrary to section 436. Indeed, there is no required procedure to be followed, and the fact that the officers did not have a set procedure for making the inspections does not diminish their power under section 436 of the New York City Charter. Cases that have examined the procedures for regulating the auto junkyard industry have concluded that, when a person enters such a pervasively regulated industry, he does so with the knowledge that he will be subjected to the supervision of the State (*People v Pace*, 111 Misc 2d 488; *People v Tinneny*, 99 Misc 2d 962, *supra*). The procedure used in the present case is an acceptable form of such supervision.

Defendant argued that an administrative warrant would protect the limited privacy rights of junkyard owners. Under an administrative warrant the officers would gain access to the junkyard only if they showed, under a less than probable cause standard, that the inspection was in pursuit of an administrative plan (*People v Pace*, 101 AD2d 336, *supra*). The Supreme Court has approved the concept of an administrative warrant (*Marshall v Barlow's, Inc.*, 436 US 307), but New York does not require officers to seek a warrant before conducting an administrative inspection of an auto junkyard. Therefore, the entry onto defendant's yard is permitted by section 436 of the New York City Charter as a part of an administrative inspection of defendant's business.

Once on the premises, the officers inspected the "articles of merchandise" as authorized under section 436. The lack of a police book is irrelevant when applying section 436 of the New York City Charter rather than subdivision 5 of section 415-a of the Vehicle and Traffic Law.

When the officers discovered that the vehicle was stolen, they had reasonable cause to arrest defendant Burger for possession of stolen property. The vehicle, as stolen property in plain view, was properly seized as incident to a lawful arrest (*People v Tinneny, supra; People v Brosnan*, 32 NY2d 254).

In conclusion, this court finds that the Auto Crimes Division officers' entrance onto defendant's yard and inspection of the items in the yard were authorized by section 436 of the New York City Charter as an administrative inspection. In addition, defendant's arrest, and seizure of the stolen property, were proper.

Therefore, defendant's motion to suppress is denied.

NEW YORK SUPREME COURT
KINGS COUNTY
(CRIMINAL TERM—PART 40)
DOUGLASS, J.
April 12, 1984
Indictment No. 6972/82

THE PEOPLE OF THE STATE OF NEW YORK
vs.
JOSEPH BURGER

MEMORANDUM

Defendant moves to suppress physical evidence seized from his business premises on the ground that Vehicle and Traffic Law, Section 415(a)(5) is unconstitutional

Defendant's argument is two-fold: (1) that the auto junkyard business is not a "pervasively regulated" industry, and (2) that the inspection is not limited in time, place and scope.

The general rule is that warrantless administrative searches are invalid. An exception to that rule is where the search is in a "pervasively regulated" industry (*United States v Biswell*, 406 US 311; *Colonnade Corp. v United States*, 397 US 72). Defendant argues that the auto junkyard industry is not such a business. However, several well-reasoned decisions have already found that "* * * the state has unequivocally indicated that it considers such business to be within the class of 'pervasively regulated' industries" (*People v Garcia*, 111 Misc 2d 550, citing *People v Tinneny*, 99 Misc 2d 962; *People v Sylvester*, nylj, 11/20/81, p. 6, col 4; see also People Pace, 111 Misc 2d 488).

Defendant next argues that the statute is unconstitutional because it fails to limit the search in time, space and scope. The court finds this argument unpersuasive. The search is limited to the record of "all motor vehicles, trailer, and major component parts thereof," and to "only those vehicles or parts subject to the record-keeping requirement." It may only be done during "regular business hours." Therefore, the court finds that the statute is limited in time, place and scope.

Defendant further argues that regardless of the constitutionality of the statute, the police had no legal right to seize the automobile without a search warrant. However, once the officers had reasonable cause to believe that the property was stolen, they had the right to arrest the defendant and seize the property. Here, the officer testified that he called the VIN number into the radio dispatcher, and received information that the vehicle was stolen. Therefore, defendant's arrest and seizure of the property was proper.

Accordingly, defendant's motion to suppress is denied.

/s/ L. L. DOUGLASS
J.S.C.

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, *Chief Judge*, Presiding

No. 135

The People &c.,

Respondent,

v.

Joseph Burger,

Appellant.

The appellant in the above entitled appeal appeared by Mahler and Harris, P.C.; the respondent appeared by Hon. Elizabeth Holtzman, District Attorney, Kings County.

The Court, after due deliberation, orders and adjudges that the order is reversed, defendant's motion to suppress granted, defendant's guilty plea vacated, the counts of the indictment charging criminal possession of stolen property dismissed, and the case remitted to Supreme Court, Kings County, for further proceedings pursuant to CPL 470.55(2). Opinion by Judge Alexander. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Titone and Hancock concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Kings County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 8, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New York Vehicle and Traffic Law § 415-a:

> 1. Definition and registration of vehicle dismantlers. A vehicle dismantler is any person who is engaged in the business of acquiring motor vehicles or trailers for the purpose of dismantling the same for parts or reselling such vehicles as scrap. No person shall engage in the business of or operate as a vehicle dismantler unless there shall have been issued to him a registration in accordance with the provisions of this section. A violation of this subdivision shall be a class E felony.
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> . . . .
>
> 2. Application for registration. An application for registration as a vehicle dismantler . . . shall be made to the commissioner on a form prescribed by him which shall contain the name and address of the applicant and the names and addresses of all persons having a financial interest in the business. Such application shall contain a listing of all felony convictions and all other convictions relating to the illegal sale or possession of a motor vehicle or motor vehicle parts, and a listing of all arrests for any such violations by the applicant and any other persons required to be named in such application. The application shall also contain the business address of the applicant and may contain any other information required by the commissioner.
>
> . . . .

> 5. Records and identification. (a) Any records required by this section shall apply only to vehicles or parts of vehicles for which a certificate of title has been issued by the commissioner or which would be eligible to have such a certificate of title issued. Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. The commissioner may, by regulation, exempt vehicles or major component parts of vehicles from all or a portion of the record keeping requirements based upon the age of the vehicle if he deems that such record keeping requirements would serve no substantial value. Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. . . . The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor.
>
> . . . .
>
> 6. Suspension, revocation and refusal to renew a registration; civil penalty. (a) A registration may be suspended or revoked, or renewal of a registration refused upon a conviction of any provision of the penal law relating to motor vehicle theft, illegal possession of a stolen vehicle or illegal possession of stolen motor vehicle parts, or after the registrant has had an opportunity to be

heard upon any change of status of the registrant which would have resulted in refusal to issue a registration, any false statement in an application for a registration, any violation of subdivision five of this section or regulations promulgated by the commissioner with respect to this section, or any violation of title ten of this chapter.

New York City Charter § 436:

The commissioner shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in second-hand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in second-hand merchandise or auctioneer, or any clerk or employee of any thereof shall be triable by a judge of the criminal court and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both.